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8 **United States District Court**  
9 **Central District of California**  
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11 JOHN HERZFELD,

12 Plaintiff,

13 v.

14 TEVA PHARMACEUTICALS USA,  
15 INC. OMNIBUS WELFARE PLAN, et al.

16 Defendants.

Case No. 2:18-cv-09784-ODW (SSx)

**ORDER DENYING PLAINTIFF'S  
MOTION FOR  
RECONSIDERATION [65]**

17 **I. INTRODUCTION**

18 Presently before the Court is Plaintiff John Herzfeld's Motion for  
19 Reconsideration of the Court's Order granting Defendant MCMC, LLC's motion to  
20 dismiss ("Motion"). (Mot. for Recons. ("Mot."), ECF No. 65.) For the reasons that  
21 follow, Plaintiff's Motion is **DENIED**.<sup>1</sup>

22 **II. BACKGROUND**

23 The Court addressed the relevant factual allegations and procedural history in  
24 its Order granting Defendant MCMC's motion to dismiss and incorporates that  
25 discussion here by reference. (*See* Order Granting MCMC's Mot. to Dismiss  
26 ("Order"), ECF No. 34.) The following brief summary is provided for context.  
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28 <sup>1</sup> After considering the papers filed in connection with this Motion, the Court deemed this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

1 John Herzfeld (“Herzfeld”) is a dependent of Jeffrey Herzfeld, who was  
2 employed by Teva Pharmaceuticals USA, Inc. (Compl. ¶¶ 2, 8, ECF No. 1.) Teva  
3 Pharmaceuticals, Inc. is the Plan Sponsor and Plan Administrator of the Teva  
4 Pharmaceuticals USA, Inc. Omnibus Welfare Benefit Plan (the “Plan”), an ERISA-  
5 governed welfare benefit plan. (Compl. ¶ 9.) Herzfeld was diagnosed with Duchenne  
6 Muscular Dystrophy (“DMD”) at the age of six and was eighteen years old at the  
7 commencement of this lawsuit. (Compl. ¶ 14.) DMD has caused Herzfeld  
8 “degeneration and weakness in his muscles such that he requires a wheelchair for  
9 mobility and effectively has no use of his arms without assistance.” (Compl. ¶ 4.)

10 At his doctors’ recommendation, Herzfeld requested coverage for a  
11 myo-electric elbow-wrist orthoses (“EWO”) called the MyoPro. (Compl. ¶¶ 22–27,  
12 57–60.) Herzfeld alleges EWOs have gained widespread acceptance in the medical  
13 community, but the claims administrator (“Quantum”) denied Herzfeld’s request for  
14 coverage, finding the MyoPro to be “Experimental and/or Investigational.” (Compl.  
15 ¶¶ 10, 32, 44, 61.) Quantum also denied Herzfeld’s internal appeals, granted his  
16 request for an external review, and assigned independent review organization (“IRO”)   
17 MCMC to conduct the de novo external review. (Compl. ¶¶ 67, 72, 74–75.) With  
18 some exceptions delineated in the applicable regulations, an external review is final  
19 and binding. (*See* Compl. ¶ 56.) MCMC upheld Quantum’s coverage denial on the  
20 ground that the MyoPro was “experimental and investigational.” (Compl. ¶ 76.)

21 Herzfeld initiated this action against MCMC and several other defendants. (*See*  
22 Compl. ¶¶ 9–13.) Herzfeld asserts three causes of action under ERISA against all  
23 defendants: (1) denial of benefits under 29 U.S.C. § 1132(a)(1)(B), (2) violation of  
24 fiduciary duties under § 1132(a)(3), and (3) denial of full and fair review under  
25 § 1133. (Compl. ¶¶ 94–115.) On August 26, 2019, the Court granted MCMC’s  
26 motion to dismiss without leave to amend. (Order 11.) The Court found that MCMC  
27 was not a proper defendant for any of Herzfeld’s claims because: (1) MCMC had no  
28 control over administration of benefits under the Plan; (2) MCMC was not an ERISA

1 fiduciary; and (3) MCMC was not the Plan, the only proper defendant for a claim  
2 under § 1133. (Order 6, 10, 11.) At MCMC's request, the Court entered partial  
3 Judgment for MCMC. (J., ECF No. 54.)

4 Herzfeld moves for reconsideration of the Court's Order dismissing MCMC  
5 under Federal Rules of Civil Procedure ("Rule") 59(e) and 60(b), and Local Rule  
6 7-18. (Mot. 7-8.)

### 7 **III. LEGAL STANDARD**

8 "[A] motion for reconsideration [under Rule 59(e)] should not be granted,  
9 absent highly unusual circumstances, unless the district court is presented with newly  
10 discovered evidence, committed clear error, or if there is an intervening change in the  
11 controlling law." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). A court  
12 may disregard "repeated legal arguments" and "facts that were available earlier in the  
13 proceedings." *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001).  
14 Rule 60(b) provides for reconsideration of a final judgment, order, or proceeding only  
15 upon a showing of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly  
16 discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied judgment; or  
17 (6) another reason that justifies relief. Fed. R. Civ. P. 60(b).

18 Local Rule 7-18 places additional limitations on motions for reconsideration.  
19 Similar to the Federal Rules, "[n]o motion for reconsideration shall in any manner  
20 repeat any oral or written argument made in support of or in opposition to the original  
21 motion." C.D. Cal. Civ. L.R. 7-18; *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803,  
22 811 (9th Cir. 1995). Grounds for a motion for reconsideration are limited to:

- 23 (a) a material difference in fact or law from that presented to the  
24 Court before such decision that in the exercise of reasonable diligence  
25 could not have been known to the party moving for reconsideration at  
the time of such decision, or
- 26 (b) the emergence of new material facts or a change of law  
27 occurring after the time of such decision, or
- 28 (c) a manifest showing of a failure to consider material facts  
presented to the Court before such decision.

1 C.D. Cal. L.R. 7-18; *see In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 966  
2 F. Supp. 2d 1031, 1036 (C.D. Cal. 2013). Displeasure with the outcome alone is  
3 insufficient; unless the moving party shows that one of the factors exists, the Court  
4 will not grant reconsideration. *See Carroll*, 342 F.3d at 945 (“[A] motion for  
5 reconsideration should not be granted, absent highly unusual circumstances,” unless  
6 one of the factors is present); *Arteaga v. Asset Acceptance, LLC*, 733 F. Supp. 2d  
7 1218, 1236 (E.D. Cal. 2010) (noting that mere disagreement with court’s conclusions  
8 is not sufficient).

9 Reconsideration is an “extraordinary remedy, to be used sparingly in the  
10 interests of finality and conservation of judicial resources.” *Carroll*, 342 F.3d at 945;  
11 *Collins v. U.S. Citizenship & Naturalization Serv.*, No. CV 11-9909-JFW (SSx), 2013  
12 WL 776244, at \*1 (C.D. Cal. Feb. 6, 2013) (internal quotation marks omitted)  
13 (“Motions for reconsideration are disfavored and are rarely granted.”). Whether to  
14 grant a motion for reconsideration is within the court’s discretion. *McDowell v.*  
15 *Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999); *Arteaga*, 733 F. Supp. 2d at 1236.

#### 16 IV. DISCUSSION

17 Herzfeld contends that a recent ruling in the Northern District of California  
18 requires the Court to reconsider its finding that MCMC is not an ERISA fiduciary.  
19 (Mot. 3.) Herzfeld also argues that the Court failed to consider material facts and  
20 erred in its application of law. (Mot. 3–4.) The Court finds Herzfeld’s arguments  
21 unpersuasive and insufficient to satisfy the taxing burden for reconsideration.<sup>2</sup>

#### 22 A. MCMC’s Opposition

23 As a preliminary matter, Herzfeld argues the Court should not consider  
24 MCMC’s opposition because it was filed one day late. (Reply 12, ECF No. 68; Opp’n  
25 to Mot. (“Opp’n”), ECF No. 66.) MCMC invokes Rule 6(b) to request that the Court  
26 consider its opposition. (Req. to Consider Late-Filed Opp’n (“Req.”) 2, ECF No. 67.)  
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<sup>2</sup> The Court finds Herzfeld’s remaining arguments equally without merit.

1 Rule 6(b)(1) provides that the court may, for good cause, extend the time for a  
2 party to act “if the party failed to act because of excusable neglect.” Fed. R. Civ. P.  
3 6(b)(1)(B). “[L]ike all the Federal Rules of Civil Procedure, [Rule 6(b) is] to be  
4 liberally construed to effectuate the general purpose of seeing that cases are tried on  
5 the merits.” *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258–59 (9th Cir.  
6 2010) (internal quotation marks omitted).

7 Under these circumstances, the Court finds the one-day delay does not  
8 prejudice Herzfeld, as he had adequate time to prepare his Reply and could have, but  
9 did not, request an extension of his deadline. Also, it is undisputed that the delay was  
10 the unintentional result of staffing changes and the termination of MCMC from this  
11 action. (See Req. 1–2.) Finally, the one-day delay did not impact the proceedings and  
12 there is no evidence of bad faith. See *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*  
13 *Ltd. P’ship*, 507 U.S. 380, 395 (1993) (discussing circumstances to consider when  
14 evaluating excusable neglect, including “the danger of prejudice,” the length of the  
15 delay and impact on proceedings, “the reason for the delay . . . and whether the  
16 movant acted in good faith”); *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381  
17 (9th Cir. 1997) (noting that *Pioneer* analysis of excusable neglect is applicable to  
18 requests under Rule 6(b)). Accordingly, the Court **GRANTS** MCMC’s request to  
19 consider its opposition. (ECF No. 67.) The Court notes, however, that even without  
20 MCMC’s opposition, reconsideration is not warranted.

## 21 **B. Material Difference in Law**

22 Herzfeld asks the Court to reconsider its finding that MCMC is not an ERISA  
23 fiduciary. He contends that “a material difference in . . . law [exists] from that  
24 presented to the [C]ourt,” which Herzfeld could not have discovered through  
25 reasonable diligence before the Court’s decision. (Mot. 10 (citing C.D. Cal.  
26 L.R. 7-18.) Herzfeld points to *Josef. K v. California Physicians’ Service*,  
27 No. 18-cv-06385-YGR, 2019 WL 2342245 (N.D. Cal. June 3, 2019), where the  
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1 district court found an external reviewer to be a functional fiduciary under ERISA.  
2 (Mot. 10.) However, the Court finds that *Josef K.* does not support reconsideration.

3 First, the decision in *Josef K.* is not controlling precedent for this Court.  
4 Second, it was issued on June 3, 2019, two months before this Court issued its  
5 decision on August 26, 2019. Herzfeld argues he had no reason to continue  
6 researching once the motion was fully-briefed, but nothing suggests he could not have  
7 discovered the decision with an exercise of reasonable diligence.

8 Third, the court in *Josef K.* relied on *Del Prete v. Magellan Behavioral Health,*  
9 *Inc.*, 112 F. Supp. 3d 942 (N.D. Cal. 2015), to conclude that the external reviewer—an  
10 “independent medical reviewer,” not an IRO like MCMC—was a functional fiduciary  
11 under ERISA. *Josef. K.*, 2019 WL 2342245, at \*7. But Herzfeld also relied on *Del*  
12 *Prete* in his opposition to MCMC’s motion to dismiss, so *Josef K.* does not represent a  
13 material change in law from that previously presented to this Court. (See Opp’n to  
14 Mot. to Dismiss (“Opp’n MTD”) 10–11, ECF No. 25.) Further, the Court expressly  
15 considered and disagreed with *Del Prete* in its Order granting dismissal. (See Order  
16 9.) Herzfeld may not ask the Court to “rethink what the Court has already thought  
17 through merely because [he] disagrees with the Court’s decision.” *In re Benham*,  
18 No. CV13-0205-VBF, 2013 WL 3872185, at \*9 (C.D. Cal. May 29, 2013).  
19 Accordingly, *Josef K.* does not provide grounds for reconsideration.

### 20 **C. Manifest Failure to Consider Material Facts and Clear Error**

21 Herzfeld also contends that the Court failed to consider material facts and  
22 committed clear error in applying regulations and interpreting Ninth Circuit precedent.  
23 (Mot. 12–18.) Yet, Herzfeld merely rehashes the same arguments previously made  
24 and rejected.

25 Clear error occurs where the court “is left with the definite and firm conviction  
26 that a mistake has been committed.” *Smith v. Clark Cty. Sch. Dist.*, 727 F.3d 950, 955  
27 (9th Cir. 2013). The moving party “must set forth facts or law of a strongly  
28 convincing nature to induce the court to reverse its prior decision.” *Arteaga*, 733 F.

1 Supp. 2d at 1236. Where the asserted basis for reconsideration is a failure to consider  
2 facts, the moving party must make a “manifest showing” of the court’s failure to  
3 consider “material facts” previously presented. C.D. Cal. L.R. 7-18.

4 *1. Final and Binding Determination*

5 Herzfeld argues the Court “failed to consider material facts alleged in the  
6 Complaint.” (Mot. 8–9.) Specifically, Herzfeld argues the Court erred when it  
7 “determined erroneously that Quantum made the final decision to deny benefits” and  
8 did not consider his allegation that an external reviewer’s determination was the final,  
9 binding decision. However, Herzfeld specifically alleges in his Complaint that  
10 Quantum denied Herzfeld’s request for coverage and that MCMC upheld that denial.  
11 (See Order 3 (citing Compl. ¶¶ 10, 39, 61, 76).) Further, the Court expressly  
12 considered Herzfeld’s allegation regarding the external review, noting, “[w]ith some  
13 exceptions, the external review determination is binding on both the Plan and the  
14 claimant.” (Order 3 (citing Compl. ¶ 56).) Thus, Herzfeld fails to make a manifest  
15 showing that the Court did not consider these allegations.

16 Additionally, the “exceptions” articulated in the regulations provide  
17 circumstances where the external reviewer’s determination is *not* final and binding,  
18 including the circumstances Herzfeld alleges, where an external reviewer upholds  
19 denial. (See Order 7–8 (citing 45 C.F.R. § 147.136(d)(2)(iii)(B)(7)(v) (listing  
20 exceptions to an IRO’s binding determination, including that a Plan may pay for or  
21 provide the benefit even where an IRO upholds denial, as MCMC did here)).) Thus,  
22 the Court expressly considered Herzfeld’s allegation that MCMC’s determination was  
23 final and binding and accepted it as true to the extent not contradicted by applicable  
24 regulations. See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)  
25 (discussing that a court need not “accept as true allegations of matters properly subject  
26 to judicial notice”).

27 Herzfeld next contends the Court erred by applying an incorrect regulation, 45  
28 C.F.R. § 147.136. (Reply 11.) Herzfeld argues that the applicable regulation is

1 instead 29 C.F.R. § 2590.715-2719. (Reply 6 n.3, 11; *see* Mot. 15–16.) However, the  
2 language of the two relevant regulation sections is *identical* and provides the same  
3 exceptions to the finality of an external reviewer’s determination. *Compare* 45 C.F.R.  
4 § 147.136(d)(2)(iii)(B)(7)(v) *to* 29 C.F.R. § 2590.715-2719(d)(2)(iii)(B)(7)(v).<sup>3</sup>  
5 Herzfeld implicitly acknowledges the similarity, as he cites to *both* regulations in his  
6 present Motion, where he repeats the argument that an external review is final and  
7 binding (notably ignoring the exceptions). (*See* Mot. 16:9–10.) Accordingly, the  
8 Court is not left with a definite and firm conviction that a mistake has been made, and  
9 this argument does not warrant reconsideration.

10 Finally, Herzfeld did not raise this argument or otherwise rely on 29 C.F.R.  
11 § 2590.715-2719(d)(2)(iii)(B)(7)(v) in opposition to MCMC’s motion to dismiss.  
12 (*See* Opp’n MTD, TOC iii.) Indeed, he cited 45 C.F.R. § 147.136, the regulation he  
13 now contends does not apply. (*See* Opp’n MTD 11.) He may not raise this argument  
14 now in hopes of a do-over. *See Carroll*, 342 F.3d at 945 (affirming denial of  
15 reconsideration because motion may not “raise arguments or present evidence for the  
16 first time when they could reasonably have been raised earlier in the litigation.”); *In re*  
17 *5-Hour Energy Mktg. & Sales Practices Litig.*, No. ML 13-2438 PSG (PLAx), 2017  
18 WL 4772567, at \*4 (C.D. Cal. Aug. 11, 2017) (motions for reconsideration not meant  
19 to serve as a “do-over”).

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23 <sup>3</sup> Both regulations provide:

24 (7) The assigned IRO’s written notice of the final external review decision must  
25 contain . . . (v) A statement that the IRO’s determination is binding *except* to the  
26 extent that other remedies may be available under State or Federal law . . . *or to the*  
27 *extent* the health plan or health insurance issuer voluntarily makes payment on the  
claim or otherwise provides benefits at any time, *including after a final external*  
review decision that denies the claim or otherwise fails to require such payment or  
benefits.

28 29 C.F.R. § 2590.715-2719(d)(2)(iii)(B)(7)(v) & 45 C.F.R. § 147.136(d)(2)(iii)(B)(7)(v) (emphasis  
added).



1           2.     *Additional Arguments*

2           Herzfeld also contends the Court committed clear error by erroneously  
3 concluding that “the Ninth Circuit only considers insurance companies to have the  
4 ability to grant or deny claims as being the universe of potential” functional  
5 fiduciaries. (Mot. 13.) Far from Herzfeld’s tortured reading, the Court discussed that  
6 a functional fiduciary is anyone “who exercises discretionary authority or control”  
7 over an employee benefit plan or its assets, as, for instance, with an insurance  
8 company that has been granted authority to grant or deny claims. (Order 7, 9.) The  
9 Court concluded that, because MCMC did not possess such discretionary authority  
10 based on Herzfeld’s allegations and the applicable regulations, MCMC was not a  
11 functional fiduciary under ERISA. (Order 7–10.) The Court is not firmly convinced a  
12 mistake has been made and Herzfeld’s disagreement with the Court’s conclusions is  
13 not grounds for reconsideration. *See Pegasus Satellite Television, Inc. v. DirecTV,*  
14 *Inc.*, 318 F. Supp. 2d 968, 981 (C.D. Cal. 2004) (denying Pegasus’s motion for  
15 reconsideration on grounds of “improper appli[cation] [of] Ninth Circuit” opinion  
16 because “a motion for reconsideration may not be made on the grounds that a party  
17 disagrees with the Court’s application of legal precedent.”).

18           Herzfeld also argues the Court failed to consider his allegations that MCMC  
19 was biased and predetermined the outcome of the review. (Mot. 9.) He improperly  
20 repeats the same arguments he raised in opposition to MCMC’s motion to dismiss,  
21 specifically that MCMC’s misconduct constitutes breach of fiduciary duties under  
22 ERISA. (*Compare* Mot. 18–19 to Opp’n MTD 11.) A court may disregard “repeated  
23 legal arguments” and “facts that were available earlier in the proceedings.”  
24 *Zimmerman*, 255 F.3d at 740; *see also* C.D. Cal. 7-18 (“No motion for reconsideration  
25 shall in any manner repeat any oral or written argument made in support of or in  
26 opposition to the original motion.”) Further, the allegations Herzfeld relies on for  
27 reconsideration were before the Court on MCMC’s motion and Herzfeld does not  
28 make a “manifest showing” that Court failed to consider them. C.D. Cal. L.R. 7-18.

1 Finally, in what seems an afterthought, Herzfeld contends the Court erred by  
2 failing to consider whether he could amend to assert a claim against MCMC for  
3 nonfiduciary liability under § 1132(a)(3). (Mot. 20.) However, nothing in Herzfeld’s  
4 complaint suggests a claim against MCMC for *nonfiduciary* liability. (See Compl.  
5 ¶¶ 102–09 (asserting second claim for “Violation of Fiduciary Duties of Loyalty and  
6 Due Care in Violation of ERISA,” under § 1132(a)(3).) Each allegation supporting  
7 his second claim invoked fiduciary duty. (See Compl. ¶¶ 105, 108, 109.<sup>4</sup>) Yet,  
8 despite MCMC’s arguments in its motion to dismiss that it was not an ERISA  
9 fiduciary, Herzfeld did not raise the specter of a nonfiduciary claim in his opposition.  
10 (Mot. to Dismiss 9–12, ECF No. 22; *see generally* Opp’n MTD.) Indeed, Herzfeld  
11 sought leave to amend only “to address any deficiencies” the Court identified. (Opp’n  
12 MTD 15.)

13 Herzfeld could have, but did not, request leave to amend to assert a new  
14 nonfiduciary claim against MCMC; consequently, he may not now raise the argument  
15 as grounds for reconsideration. *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877,  
16 890 (9th Cir. 2000) (“[M]otion may not be used to raise arguments . . . for the first  
17 time when they could reasonably have been raised earlier in the litigation”); *see*  
18 *McMichael v. U.S. Filter Corp.*, No. EDCV 99-182 VAP (MCx) (Consol.), 2001 WL  
19 418981, at \*18 (C.D. Cal. April 17, 2001) (denying reconsideration in part because  
20 plaintiff had not previously raised a basis for amendment). Additionally, Herzfeld  
21 fails to offer “strongly convincing” law or facts that denying leave to amend to assert  
22 a new claim against MCMC was “manifestly unjust.” *Arteaga*, 733 F. Supp. 2d at  
23 1236; *Zimmerman*, 255 F.3d at 740. As the Court is not left with the definite and firm  
24 conviction a mistake has been made, it declines to find clear error.

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28 <sup>4</sup> Compl. ¶¶ 105 (“MCMC [has] violated [its] fiduciary duty of care”), 108 (“MCMC [has] violated  
[its] fiduciary duty of loyalty”), 109 (“[Herzfeld] is entitled to relief to remedy . . . MCMC[’s] . . .  
violation of [its] fiduciary duties under ERISA § 502(a)(3).”).

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April 14, 2020

**OTIS D. WRIGHT, II**  
**UNITED STATES DISTRICT JUDGE**